

DISTRICT COURT, DENVER COUNTY, COLORADO  1427 Bannock Street, Room 256 Denver, Colorado 80202	<b>COURT USE ONLY</b>
STATE OF COLORADO, ex rel. JOHN W. SUTHERS, ATTORNEY GENERAL,  Plaintiff,  v.  THE DANNON COMPANY, INC., a Delaware corporation;  Defendant.	
JOHN W. SUTHERS, Attorney General JAY B. SIMONSON First Assistant Attorney General, 24077* 1525 Sherman Street, 7 <sup>th</sup> Floor Denver, CO 80203 (303) 866-5079 (303) 866-4916 Fax *Counsel of Record	
<p style="text-align: center;"><b>COMPLAINT</b></p>	

Plaintiff, the State of Colorado, upon relation of John W. Suthers, Attorney General for the State of Colorado, by and through undersigned counsel, states and alleges as follows:

### INTRODUCTION

1. The Colorado Attorney General brings this action on behalf of the State of Colorado pursuant the Colorado Consumer Protection Act, Colo. Rev. Stat. §§ 6-1-101 through 115 (2010) (“CCPA”), to enjoin and restrain the Defendants from engaging in certain deceptive and unfair business practices, as well as for statutorily-mandated civil penalties, for disgorgement, restitution, and for other relief as provided in the CCPA.

### PARTIES

2. John W. Suthers is the duly-elected Attorney General of the State of Colorado and is authorized to enforce the CCPA under Colo. Rev. Stat. § 6-1-103.

3. The Defendant, the Dannon Company, Inc., is incorporated in Delaware with its principal place of business in White Plains, New York. The Defendant has manufactured, marketed, distributed, and sold food products to consumers throughout the United States, including Colorado. The Dannon Company, Inc, is a privately-held corporation that is wholly owned by Groupe Danone, its French parent corporation.

### JURISDICTION AND VENUE

4. Pursuant to the CCPA, Colo. Rev. Stat. §§ 6-1-103 and 6-1-110(1), this Court has jurisdiction to enter appropriate orders prior to and following an ultimate determination of liability.

5. At all times relevant to this action, Defendant has advertised and sold its products within Denver County, Colorado. Accordingly, venue is proper under Colo. Rev. Stat. § 6-1-103, and Colorado Rule of Civil Procedure 98.

6. This action is timely brought pursuant to Colo. Rev. Stat. § 6-1-115 in that it is brought within three years of the date on which false, misleading, and deceptive acts or practices occurred and/or were discovered, and the series of false, misleading, and deceptive acts and practices may be continuing in nature.

### PUBLIC INTEREST

7. Through misleading advertisements, Defendant has deceived and financially injured consumers in Colorado and throughout the United States. In addition, through unfair competition, Defendants have harmed businesses in Colorado and throughout the United States that have refrained from engaging in similar deceptive advertising..

8. Therefore, the Attorney General believes these legal proceedings are in the public interest and are necessary to safeguard Colorado citizens from Defendants' unlawful business activities.

### STATUTORY BACKGROUND

9. The Colorado Consumer Protection Act (CCPA) prohibits deceptive trade practices as set forth in the statute. *Id.* § 6-1-105 (2010). Violators of the Act are subject to fines, payment of restitution, disgorgement, and payment of attorney fees and costs necessary for the investigation and filing of this action. The Act also provides broad injunctive powers to this Court to remedy and to prevent further violations.

### GENERAL ALLEGATIONS

10. The Defendant has made health-related claims in the marketing, packaging, advertising, offering, and selling of its line of Activia yogurt and DanActive food products that were not

substantiated by competent and reliable scientific evidence at the time the claims were made in violation of state law.

11. Concerning Activia, the State alleges that the Defendant's health-related claims, which asserted a benefit for combating slow intestinal transit time, temporary irregularity, diarrhea, constipation, bloating, digestive comfort, and other regularity problems, were misleading, deceptive and unfair in that they were not adequately substantiated at the time the claims were made. Among other things, the State alleges that the Defendant did not have adequate substantiation to support claims that Activia provided select health benefits at one 4 oz. serving per day for two weeks. Further, the State alleges that the Defendant made direct or implicit claims to mitigate, prevent, or treat certain diseases relating to digestive health, that were unlawful and also not substantiated by competent and reliable scientific evidence at the time the claims were made.

12. Concerning DanActive, the State alleges that the Defendant's health-related claims, which were positioned to provide "immunity," a general wellness benefit and which claimed antiviral and other "germ fighting" benefits, were misleading, deceptive and unfair in that they were not adequately substantiated at the time the claims were made. Further, the State alleges that the Defendant made direct or implicit claims to mitigate, prevent, or treat certain diseases, including the common cold and the flu, that were unlawful and also not substantiated by competent and reliable scientific evidence at the time the claims were made.

### **SPECIFIC ALLEGATIONS**

13. Activia is a yogurt product produced and distributed by the Defendant that is sold at third-party retailers throughout the United States including in Colorado at what amounts to a 30% to 50% premium over other yogurt products.

14. Currently, the Defendant's Activia product line includes Activia, Activia Fiber, Activia Light, Activia Drinks, and Activia Dessert. The Defendant's yogurt products are packaged in 4 oz. units or 24 oz. tubs in a variety of flavors including vanilla, strawberry, blueberry, mixed berry, and prune.

15. The Defendant began marketing Activia in February 2006 through an extensive marketing campaign that included television, radio, print, web, and in-store components examples of which are included within this Complaint. From the initial product launch of Activia, the Defendant positioned Activia as helping to regulate one's digestive system.

16. From the initial product launch, the Defendant emphasized the presence of *Bifidobacterium animalis* DN-173-010, which it marketed under the fanciful, trademarked name *Bifidus Regularis* as a distinguishing component ingredient that differentiated Activia from traditional yogurt products and competitors. At the product launch and thereafter, the Defendant asserted that "*Bifidus Regularis*" was a probiotic bacteria strain that helped to contribute to the purported regularity benefit.

17. Initially, the Defendant broadly asserted, in advertisements like the one shown below, that Activia “helps regulate your digestive system . . . naturally” without any disclaimer, while only holding scientific evidence purportedly showing an effect on consumers with “slow transit time,” (i.e. the length of time for food to travel from being ingested to eliminated from the body).



18. Later, the Defendant attempted to qualify the “helps regulate your digestive system” tagline with an asterisk indicating that its claim referred only to “help[ing] with slow intestinal transit time when eaten every day for two weeks as part of a balanced diet and healthy lifestyle.”

19. The Defendant claimed that Activia provided a benefit to consumers with normal transit times when it did not have competent and reliable scientific evidence to substantiate the claim at the time it was made.

20. The Defendant’s implicitly claimed through its broad, unqualified tagline “helps *regulate* the digestive system” that Activia provided consumers with bowel movements at fixed, uniform, or normal intervals when it did not have competent and reliable scientific evidence to substantiate the claims at the time they were made.

21. The Defendant also asserted that Activia had an effect on the stomach and the process of digestion when it did not have competent and reliable scientific evidence to substantiate the claims at the time they were made. For example, in several nationwide advertisements, the Defendant used the tagline “two delicious weeks to one happy tummy!”



22. Through advertisements that referenced bloating through statements like “some days does your digestive system feel irregular and bloated,” the Defendant asserted that Activia provided a benefit on bloating when it did not have competent and reliable scientific evidence to substantiate the claim at the time it was made.

23. The Defendant implicitly asserted that Activia had antimicrobial benefits, anti-infectious benefits, and an effect on colon cancer when it could not make these claims without pre-approval as a drug and also did not have competent and reliable scientific evidence to substantiate the claim at the time it was made. For example, the Defendant sent health professional Activia-branded informational brochures that prominently highlighted the Activia brand name and logo, contained the following excerpts:

#### b – Antimicrobial action

*In vitro*, bifidobacteria have demonstrated antibacterial activity with regard to a certain number of pathogenic microorganisms, such as *Escherichia coli*, *Staphylococcus aureus*, *Salmonella typhi*, *Shigella dysenteriae* and *Candida albicans*.

The antimicrobial action exhibited by these bifidobacteria is due in part to the production of substances such as bacteriocins and peroxides, but also to the production of organic acids, such as lactic acid and acetic acid. The latter, by reducing the pH within the intestinal medium, antagonizes the growth of certain microorganisms.

#### c – Action on immunity

Beneficial action of bifidobacteria on cellular immunity has been widely demonstrated *in vitro*, but there are, as of today, relatively few positive results *in vivo*. A number of studies performed in animals and in man suggest that ingestion of certain strains of bifidobacteria improves nonspecific, anti-infectious, defense mechanisms.

#### d – Bifidobacteria and colon cancer

Many studies have focused on bifidobacteria and colon cancer in recent years.<sup>18</sup> A number of these studies performed in animal models demonstrate an effect on certain experimental cancers. In man, bifidobacteria have shown an effect on the activity of enzymes involved in conversion of procarcinogens to carcinogens, such as nitrosamines and secondary amines.<sup>20</sup> The mechanisms responsible and the long-term effects of these changes have not yet been fully elucidated. Considerable research is currently being carried out in this domain.



24. DanActive is a dairy drink product produced and distributed by the Defendant that is sold at third-party retailers throughout the United States including in Colorado.

25. Currently, the Defendant's DanActive product line includes DanActive and DanActive Light. DanActive is packaged in 100 mL "daily dose" bottles and come in a variety of flavors.

26. In January 2007, following the release of Activia, the Defendant launched DanActive nationally with an extensive nationwide marketing campaign that included television, radio, print, web, and in-store components. From the initial product launch of DanActive, the Defendant positioned the product as providing consumers with "immunity" rather than as modest role in helping support or maintain the immune system. The tagline the Defendant used for DanActive was "help strengthen your body's defenses."



27. From the initial product launch, the Defendant emphasized the presence of *Lactobacillus casei* strain DN-114 001, which it marketed under the fanciful, trademarked name *L. casei* *Defensis* and later *L. casei* *Immunitas*. At the product launch and thereafter, the Defendant asserted that the strains were probiotics.

28. The Defendant represented that DanActive would provide health benefits to consumers with normal functioning immune systems when it did not have competent and reliable scientific evidence to substantiate the claims at the time that they were made.

29. The Defendant also represented that DanActive would provide health benefits on the immune systems of children when it did not have competent and reliable scientific evidence to substantiate the claims at the time that they were made. Example advertisements are shown below:



30. In national advertisements, the Defendant directly and implicitly claimed that DanActive provided germ fighting, antiviral, cold prevention, flu prevention and other disease prevention benefits when it did not have competent and reliable scientific evidence to substantiate the claims at the time that they were made.

31. In its DanActive advertisements, the Defendant featured situations commonly associated with cold, flu, or virus transmission including, but not limited to getting sneezed on, standing in the rain or snow without adequate clothing coverage, digging through a commercial dumpster, accepting food, money, and other items that have been handled in an unhygienic manner, when it did not have competent and reliable scientific evidence to substantiate the claims at the time that they were made.

32. In other national advertisements ran during the peak of cold and flu season, the Defendant featured advertisements with depictions of the DanActive bottle with a winter hat and scarf under the taglines “Winter is right around the corner. Are you ready?” and “Bundle Up Your Body’s Defenses. It’s that time of year.”

## BUNDLE UP YOUR BODY'S DEFENSES



It's that time of year. Time to start strengthening your natural defenses with DanActive®. About 70% of your immune system is in your digestive tract. Only DanActive® has L. casei Immunitas® and is clinically proven to help strengthen your body's defenses.

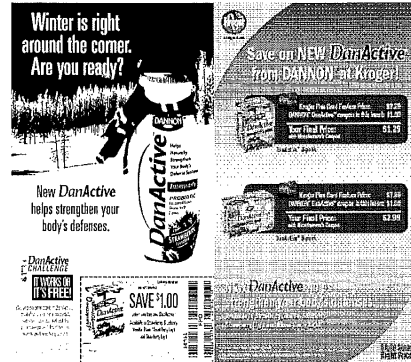
Help Strengthen Your Body's Defenses

For more information visit [danactive.com](http://danactive.com)

• Kroger 10/23 Retail Connection

— Circulation: 2,130,000

DANNON Customer Marketing



33. In DanActive television advertisements, the Defendant featured an animation depicting a cellular membrane “fortified with L. casei Immunitas” repelling all or nearly all of animated depictions of germs.

34. In DanActive television advertisements, the Defendant also symbolized a weak immune system by depicting the actors in grayscale while the rest of the screenshot remained in color. In these advertisements, once the actor drank DanActive he or she returned to color and then conveyed a yellow halo in the same color yellow used on the DanActive bottle and logo. The use of this animation conveyed that DanActive provides disease protection to consumers when the Defendant did not have competent and reliable scientific evidence to substantiate the claims at the time they were made.

35. The Defendant misled consumers, including those in Colorado, as to matter of facts in their advertisements, product labeling, and marketing materials as set forth in paragraph 11-35 above.

## CLAIMS FOR RELIEF

### FIRST CLAIM OF RELIEF

(False representations as to the characteristics and benefits of services)

36. Plaintiff incorporates herein by reference all of the allegations contained in Paragraphs 1 through 35 of this Complaint.

37. Through the above-described conduct in the course of their business, Defendants made false representations as to the characteristic or benefits of their services in violation of § 6-1-105(e), C.R.S. (2010).



38. By means of the above-described unlawful deceptive trade practices, Defendants deceived, misled, and unlawfully acquired money from consumers from Colorado.

SECOND CLAIM OF RELIEF  
(Failure to disclose material information)

39. Plaintiff incorporates herein by reference all of the allegations contained in Paragraphs 1 through 35 of this Complaint.

40. Through the above-described conduct in the course of their business, Defendants failed to disclose material information in violation of § 6-1-105(u), C.R.S. (2010).

41. By means of the above-described unlawful deceptive trade practices, Defendants deceived, misled, and unlawfully acquired money from consumers from Colorado.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays for judgment against the Defendants and the following relief:

- A. An order declaring Defendants' above-described conduct to be in violation of the Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-105(e), and (u) (2010).
- B. An order permanently enjoining Defendants, their officers, directors, successors, assigns, agents, employees, and anyone in active concert or participation with any Defendant with notice of such injunctive orders, from engaging in any deceptive trade practices as defined in and proscribed by the CCPA and as set forth in this Complaint.
- C. Appropriate orders necessary to prevent Defendants' continued or future deceptive trade practices.
- D. For a judgment in an amount to be determined at trial for restitution, disgorgement, or other equitable relief pursuant to Colo. Rev. Stat. § 6-1-110(1) (2010).
- E. An order requiring Defendants to forfeit and pay to the General Fund of the State of Colorado civil penalties pursuant to Colo. Rev. Stat. § 6-1-112(1) (2010).
- F. An order requiring Defendants to pay the costs and expenses of this action incurred by the Attorney General, including, but not limited to, Plaintiff's attorney fees, pursuant to Colo. Rev. Stat. § 6-1-113(4) (2010).
- G. Any such further orders as the Court may deem just and proper to effectuate the purposes of the CCPA.

Dated this 15<sup>th</sup> day of December, 2010.

JOHN W. SUTHERS  
Attorney General

*Jay B. Simonson*

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*Pursuant to C.R.C.P. 121, § 1-26(9), the original of this document with original signatures is maintained in the offices of the Colorado Attorney General, 1525 Sherman Street, Denver, CO 80203, and will be made available for inspection by other parties or the Court upon request.*